United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7284

United States Court of Appeals
FOR THE SECOND CIRCUIT

8-8-75

LAWRENCE R. BARNETT, C. LEONARD GORDON and ALFRED L. HOLLENDER,

Plaintiffs-Appellants,

against

DON KIRSHNER, IRVING COHEN, HERBERT T. MOELIS and KIRSHNER ENTERTAINMENT CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE DEFENDANTS-APPELLEES

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Statement of the Issues

1. Has it been demonstrated that the Trial Court erred in finding that the "consent forms" sent by the defendants to third parties were not part of the transactions between the plaintiffs and the defendants?

2. Has it been demonstrated that the Trial Court erred in holding that the defendants took good and valid title from the plaintiffs on the dates the stock was delivered and the purchase price received?

3. Has it been demonstrated that the identity of the ultimate purchaser of plaintiff Hollender's stock was a material fact?

Statement of the Case

This is an action for damages for alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and S.E.C. Rule 10b-5, 17 C.F.R. 240.10b-5. Plaintiffs are former shareholders of Kirshner Entertainment Corporation, Kirshner Productions Inc. and Don Kirshner Music Inc. (hereinafter sometimes referred to jointly as "KEC"). Plaintiffs charged the individual defendants with secretly conspiring to purchase the plaintiffs' holdings in KEC at a price substantially below the real value of said securities by wilfully concealing from the plaintiffs the fact that the defendants had allegedly secretly arranged the sale to KEC of valuable property rights belonging to renowned composer and lyricist Alan Jay Lerner, which properties (hereinafter referred to as the "Lerner Properties") would greatly enhance the value of the KEC stock.

Proceedings Below

This matter was tried before Hon. Whitman J. Knapp, sitting without jury. The trial commenced on the 18th day of December, 1974 and terminated on December 19, 1974. All of the named plaintiffs appeared and testified on their own behalf. In addition thereto, the plaintiffs read into the record selected portions of the examinations before trial of the defendant Herbert T. Moelis and introduced numerous exhibits into evidence.

In addition to the documents introduced, Irving Cohen testified on behalf of the defendants.

Based upon the evidence, Judge Knapp dismissed the complaint finding that the plaintiffs had failed to prove their case on the merits.

At the close of trial plaintiffs made a formal motion for judgment notwithstanding the verdict. After full consideration of plaintiffs' briefs and after hearing post-trial argument, the Court denied plaintiffs' motion.

Statement of Facts

On December 30, 1968 the defendants Herbert T. Moelis (hereinafter referred to as "Moelis"), Don Kirshner (hereinafter referred to as "Kirshner") and Irving Cohen (hereinafter referred to as "Cohen") acquired from the plaintiffs Lawrence R. Barnett (hereinafter referred to as "Barnett") and C. Leonard Gordon (hereinafter referred to as "Gordon") all of said individuals' stock interests in KEC at an agreed purchase price of $14,000 (Exs 11, 31 @ JA 120a, 124a).[1]

On January 29, 1969 the defendant Cohen, as nominee for one Irving Moskovitz, acquired all of the plaintiff Alfred L. Hollender's (hereinafter referred to as "Hollender") stock interest in KEC for an agreed price of $8,000.00 (Ex 58 @ JA 132a; JA 57a; Tr 83). All of the aforesaid sales came about by reason of the plaintiffs' desire to sell their shares and their solicitation of the defendants to acquire same (JA 57a-59a; Tr 80, 311; Ex 53 @ JA 130a; Tr 137-140, 159-163).

All of the plaintiffs were key executives of Chris Craft Industries, Barnett was a Vice President of Chris Craft, Gordon was a Vice President and General Counsel, and Hollender was Executive Vice President (JA 60; Tr 132, 153). All of the plaintiffs acquired their stock interest in KEC through the efforts of Herbert J. Siegel, Chairman

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[1] Citations to the Joint Appendix are designated as "JA"; and to the Transcript of Trial (where not included in the Joint Appendix) as "Tr". Exhibits are cited by number and page of the Joint Appendix, e.g. "Ex 53 @ JA 130a" and by number only where not reproduced in the appendix.

of the Board and President of Chris Craft Industries (Tr 63, 131, 154-155).

A. *Plaintiff Barnett.*

Plaintiff, Barnett, acquired his 8,160 shares of KEC in June of 1967 at a cost of $1.00 a share. In addition thereto, he was obligated to loan the company $80,000 and did, in fact, loan the company $[illegible],000 (Ex 1; JA 32a, 78a). Barnett served as a director of the company from January 5, 1968 until the date when he sold his shares to the defendants, Kirshner and Cohen (JA 32a).

In the summer and fall of 1968 plaintiff Barnett expressed his dissatisfaction with the way the defendants, Don Kirshner, as President of KEC, and Herbert T. Moelis, as Vice President and Treasurer of KEC, were running that company. Particularly, he felt that Kirshner and Moelis were incurring expenses not justified by the Company's income (Tr 136). At the time that Barnett expressed his dissatisfaction with his investment in KEC, he was advised that Moelis and Kirshner would make arrangements to buy out any stockholder of KEC who was dissatisfied with his investment (JA 79a). This statement of policy by Moelis and Kirshner was conveyed to Barnett by plaintiff Hollender, and Barnett readily accepted the opportunity to sell his interest in KEC to the defendants (Tr 109-111).

The sale was consummated on December 30, 1968, at which time Barnett sold 50% of his 8,160 shares to the defendant Kirshner, and 50% of his holdings to the defendant Cohen. The sale by Barnett to the defendants was at an agreed purchase price of $8,000; the repayment to Barnett of his loans to KEC in the amount of $32,000; and an assumption by the defendants of Barnett's obligation to loan KEC an additional $48,000 (Ex 1, Pg. 6). At the closing of the transaction on December 30, 1968, Barnett executed a document evidencing a transfer of his stock

interest (Ex 31 @ JA 124a), and a receipt for the repayment of his loan to KEC of $32,000 plus interest of $558.40 (Ex 104 @ JA 125a).

B. *Gordon.*

Plaintiff Gordon acquired his 6,160 shares of KEC in June and in September of 1967. He also paid $1.00 a share and loaned the company $24,000. Gordon was also a director of KEC serving in that capacity from January 1968 to December 30, 1968, the date upon which he sold his shares to the defendant Moelis (JA 32a; Tr 153).

The plaintiff Gordon was aware of Barnett's dissatisfaction and his desire to sell his interest in KEC. It appears that Gordon did not share Barnett's dissatisfaction with the way the company was being run (Tr 159). However, Gordon was aware of the general policy that Moelis and Kirshner would repurchase the interest of any stockholder who was dissatisfied with his holdings in KEC (Tr 158-159).

In the fall of 1967, Gordon, as an executive and general counsel of Chris Craft, was offered an opportunity to and did purchase convertible securities in Chris Craft, in excess of half a million dollars. In order to enable him to acquire the Chris Craft debentures, Gordon had to borrow the funds necessary to complete the purchase. That loan was guaranteed by Herbert J. Siegel, President of Chris Craft and a stockholder of KEC (JA 91a-93a). In the fall of 1968, subsequent to the acquisition by Gordon of the Chris Craft debentures, Gordon had a meeting with Siegel, at which meeting Siegel expressed a concern that Gordon might be financially overextended, and he, therefore, urged Gordon to dispose of his holdings in KEC. Gordon was not particularly interested in disposing of his interest in KEC. Siegel continued to press Gordon to dispose of his KEC holdings and Gordon finally agreed (JA 91a-94a).

On December 30, 1968, Gordon sold all of his KEC stock to the defendant Moelis. Gordon was never approached by any of the defendants to sell his shares in KEC to Moelis. Rather, he was urged to do so by his boss, Herbert Siegel (JA 91a-94a).

The closing on the sale of Gordon's stock took place on December 30, 1968. At the closing, Gordon, an attorney, signed a document evidencing his sale of 6,160 shares of KEC at an agreed price of $6,000 (Ex 11 @ JA 120a), and a document evidencing receipt of the repayment of his loans to KEC in the amount of $24,000 plus interest of $418.80 (Ex 13 @ JA 121a). As part of the agreement between buyer and seller, Gordon was also relieved of his obligation to loan KEC additional sums amounting to $40,000 (Ex 1, p. 6). Subsequent to the date of closing, Gordon paid to the law firm of Cohen & Grossberg, attorneys for the buyers, the monies needed to pay the transfer tax on the sale (JA 95a-96a). Gordon, as in the case of Barnett and subsequently Hollender, did not segregate the funds he received to provide for some possible contingency which might void the sale, but rather deposited said monies directly into his personal account (JA 35a, 36a, 96a).

C. *Plaintiff Hollender.*

Plaintiff Hollender purchased his 8,000 shares of KEC in March of 1968 and he loaned the company $32,000 (Tr 61, JA 32a). Hollender was not a director of KEC.

Hollender, like the other plaintiffs, acquired his stock by reason of his association with Chris Craft and Mr. Herbert Siegel. Hollender was involved in arranging a motion picture deal between Kirshner and Harry Saltzman (the producer of the James Bond movies). In appreciation for the role Hollender played in setting up the Saltzman-Kirshner movie deal, Kirshner made available to Hollender a specific amount of stock in KEC which

Hollender acquired at the same price paid by the original shareholders of the company (Tr 61-65).

Hollender had a friend named David Haft who was employed on the Saltzman-Kirshner movie project. In late December 1968 or January of 1969, Haft was fired by Saltzman (Tr 75). The termination of his friend adversely affected Hollender's relationship with Kirshner, and after the Haft incident Hollender advised defendant, Moelis, that he had lost confidence in the management of KEC (JA 57a-58a). Hollender thereupon requested that he be afforded the opportunity previously given to all dissatisfied shareholders, to wit, to sell his stock in KEC to Kirshner and Moelis (Ex 53, @ JA 130a). On January 10, 1969, Hollender wrote to Moelis and Kirshner, expressly stating his desire to be bought out of KEC (Ex 53). On January 29, 1969, pursuant to his offer to sell, Hollender sold his shares to defendant Cohen, as nominee for the ultimate purchaser of the shares (Ex 58 @ JA 132a; JA 36a). As in the case of Messrs. Barnett and Gordon, none of the defendants directly solicited Mr. Hollender or requested that he sell his shares in KEC (JA 71a).

The closing on the sale of Hollender shares took place on January 29, 1969 (JA 36a). On this date Hollender executed a transfer of his 8,160 shares in KEC for the sum of $8,000 and acknowledged the receipt of $32,006 representing the repayment of his loans to KEC totalling $32,000 with interest thereon of $171.84 (Ex 56, 58 @ JA 132a, 133a). Hollender was also relieved of his obligation to make further loans to the company.

D. *Lerner Transaction.*

The defendant Irving Cohen is a partner in the law firm of Cohen & Grossberg. Mr. Cohen has many years of experience in the theatrical and entertainment aspects of the law. For a substantial period of time prior to December

1968, Mr. Cohen represented Alan Jay Lerner, a well-known composer and lyricist, for which representation Mr. Cohen's law firm was well paid (Tr 254-256).

In August of 1968, Mr. Cohen was retained to represent KEC. Prior to August 1968, neither Mr. Cohen nor his law firm represented either defendant Kirshner or defendant Moelis (JA 33a). At the time Mr. Cohen was retained by KEC his representation of Mr. Lerner was known to the plaintiffs (JA 84a-85a).

In the fall of 1968 and continuing through December of 1968 and part of January of 1969, Alan Jay Lerner, through his accountant, Israel Katz, and his attorneys, Cohen and Grossberg, was negotiating with representatives of a public company known as Omega Equities Corporation, for the acquisition by Omega of certain of Mr. Lerner's properties (Tr 263-266). Also, in January of 1969, Mr. Lerner, through his financial representative and accountant, Mr. Katz, was having discussions for the possible acquisition of the Lerner Properties with other companies. The law firm of Cohen & Grossberg was fully aware of the negotiations and discussions engaged in by Mr. Katz on Mr. Lerner's behalf (Tr 263-269). At no time prior to February of 1969 were any discussions, negotiations or communications of any kind being engaged in by anyone on behalf of KEC with Mr. Lerner or any of his agents, attorneys or representatives (Tr 263).

In December 1968 and January 1969, the law firm of Cohen & Grossberg acted on behalf of defendants Moelis, Kirshner and Cohen, with respect to the acquisition of the shares of the plaintiffs (Tr 298-299, JA 34a). The transactions were primarily handled and the papers were prepared by Mr. Grossberg of the aforementioned law firm (Tr 304). On January 29, 1969, Mr. Cohen left New York

for the West Coast. He remained in Los Angeles for several days, returning some time on February 2nd (Tr 262). On the evening of February 2nd, defendant Moelis called Mr. Cohen at home and for the first time raised the possibility of KEC's acquiring the Lerner Properties (Tr 259-260). Mr. Cohen was surprised by Mr. Moelis' suggestion, particularly since it was his belief that by reason of the personalities of the individuals, a working business relationship between Mr. Kirshner and Mr. Lerner was extremely remote[2] (Tr 260). However, at Mr. Moelis' insistence, Mr. Cohen arranged a meeting between Mr. Lerner and Mr. Kirshner which took place on February 11, 1969 (Tr 262). At the meeting on February 11th, the parties agreed to explore the possibility of an acquisition of the Lerner Properties by KEC and the matter was thereupon referred to Mr. Katz, who subsequently, on or about February 17th, met with Mr. Moelis and began serious negotiations which culminated in the acquisition by KEC of the Lerner Properties on March 13, 1969 (JA 37a-38a). Since there were no discussions with anyone prior to February 2, 1969, relating to the possible acquisition of the Lerner Properites by KEC, there was no information respecting same that the defendants could have conveyed to the plaintiffs either on December 30, 1968 or January 29, 1969. The defendants had no information at that time and, therefore, neither could they nor were they obligated to convey the same to plaintiffs (Tr 263).

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[2] Mr. Cohen was not excited by the prospect of KEC acquiring the Lerner Properties since he would realize no financial gain by reason of the acquisition. The law firm of Cohen & Grossberg was receiving a percentage of Lerner's earnings from all of his compositions, and the sale of the Lerner Properties to KEC meant a potential lost income to Mr. Cohen. As noted during the proceeding, the law firm was exchanging known income for paper stock in KEC (Tr 276-277).

E. *Documents Involved in the Sale.*

On December 30, 1968, when the defendants Moelis, Kirshner and Cohen acquired the stock interests of the plaintiffs Barnett and Gordon, plaintiffs executed certain documents acknowledging the sale of their securities and the repayment of plaintiffs' prior loans to KEC (Ex 11, 13, 31, 104 @ JA 120a, 121a, 124a, 125a). At the time of the completion of the transaction the defendants paid to the plaintiffs all monies required to be paid for plaintiffs' shares in KEC and these monies were deposited by the plaintiffs in their personal bank accounts (JA 35a, 36a). On January 29, 1969, when defendant Cohen, as nominee, acquired the stock interest of the plaintiff, Hollender, similar documents as those executed on December 30, 1968, were exchanged (Ex 56, 58 @ JA 132a, 133a), and Hollender also received checks for the monies to be paid him in connection with said sale (Ex 56 @ JA 133a; JA 36a).

David Grossberg, of the firm of Cohen & Grossberg, acted as attorney for the buying defendants and prepared the necessary closing documents. The law firm of Cohen & Grossberg as attorneys for KEC were, prior to December 30, 1968, aware of the fact that the stockholders' agreement of June 27, 1967 among the stockholders of KEC required any selling stockholder to first offer his shares to the corporation and the non-selling stockholders prior to offering and selling said shares to third parties (Ex 2 @ JA 114a). The plaintiffs sellers had not complied with the aforementioned provision of the stockholders' agreement. In order to protect their clients, the buying defendants, against any possible claim by the non-selling stockholders arising out of the plaintiffs' breach of the stockholders' agreement of June 26, 1967, Mr. Grossberg prepared a form letter to be signed by all of the non-selling stockholders setting forth their consent to the sale by the selling plaintiffs to the buying defendants (JA 34a).

The Court below properly found that these "consent letlers" were not intended to affect the transactions between the selling plaintiffs and the buying defendants, nor were said documents part of said transactions (JA 23a).

Summary of Argument

The Court below properly concluded, after hearing the testimony of all of the witnesses and reviewing all of the documents submitted in evidence, that the sales of the plaintiffs' securities to the defendants were consummated on December 30, 1968 and January 29, 1969, when the plaintiffs delivered their stock to the defendants and accepted full payment therefor. Further, Judge Knapp properly concluded, from the testimony of Irving Cohen, that the defendants, prior to the purchase of the plaintiffs' stock, had fully disclosed all of the relevant and material information then in their possession.

The Court below further concluded that the so-called "consent letters" were not part of the transactions of sale between plaintiffs and defendants and had no effect whatsoever on said sales. The consent letters were, in essence, an agreement between the defendants and persons other than the plaintiffs (the non-selling stockholders of KEC), and were an attempt by the defendants to overcome the breach of contract committed by the plaintiffs.

The failure of the defendants to disclose to plaintiff Hollender that one Harry Saltzman would acquire indirect interest in the shares that Hollender was selling to the defendants was not a failure on the part of the defendants to disclose a "material" and necessary fact. Hollender's dislike for Saltzman was on purely personal grounds and had no relation to the sale of Hollender's securities to the defendants.

POINT I

The Trial Court correctly found that the consent letters were not part of the sales transactions between plaintiffs and defendants.

The KEC Shareholders' Agreement of June 26, 1967, granted to the Corporation and its individual shareholders a right of first refusal of the stock held by any of the Company's shareholders (Ex 2, p. 6 at JA 114a). The fact that the plaintiffs herein failed to offer their stock to the Corporation and all non-selling shareholders is, for all practical purposes, not in dispute.[3] Thus, the plaintiffs, at the time they sold their shares to the defendants were in clear violation of the June 26, 1967 KEC Shareholders' Agreement.

In order to remove any posible cloud on the title to the securities in KEC, which their clients, the buying defendants, had acquired from the selling plaintiffs, the law firm of Cohen & Grossberg prepared a form consent to be executed by all of the non-selling shareholders of KEC. Those documents (hereinafter sometimes referred to as the "Consent Letters") provided that in order to induce the non-selling shareholder to consent to the defendant's purchase the defendant agreed (a) to be bound by the Shareholders' Agreement as though he were a party to the same at the time signed; (b) to execute the necessary Sub-chapter S election form; and (c) to lend to the Corporation the amount of money previously lent to the Corporation by the selling plaintiff, which had been repaid to the selling

[3] The plaintiffs claim that plaintiff Hollender, by his letter of January 10, 1969, had fully complied with the provisions of the Shareholders' Agreement. However, this position does not take into account the fact that Hollender was required to offer his stock to the Company and the individual shareholders. There is no evidence of any kind that Hollender offered his stock to all non-selling shareholders prior to his sale of same to the defendants (Ex 53 @ JA 130a).

plaintiff at the time of the sale. The consent letter provided that if it were not agreed to and accepted by the non-selling stockholder prior to March 1, 1969, the defendant's offer to be bound by the KEC Shareholders' Agreement, to submit a Sub-chapter S election form; and to lend the Company a specified number of dollars, would be withdrawn (Ex 17 @ JA 122a).

The plaintiffs' contention that the consent letters were a necessary part of the transaction and considered to be such by all the parties thereto is contradicted by the testimony of the plaintiffs at trial. Both plaintiffs Barnett and Gordon expressly testified that they sold their stock on December 30, 1968 (JA 82a, 89a). Further, when plaintiffs' counsel, on direct examination, questioned plaintiff Gordon about the terms of the sale of his stock, and sought to pursue the issue of whether or not Gordon's obligation to loan money to KEC continued until the consent letters were signed by every stockholder, Gordon indicated that he didn't see the significance of the consent letter, nor did he consider its effect, if any, on his future obligations (Tr 167-168). Moreover, Gordon, an attorney, and the other plaintiffs, both sophisticated businessmen, each deposited the funds they received from the defendants upon the sale of their stock into their personal bank accounts. These actions by the plaintiffs, taken immediately subsequent to the sale, evidence a total lack of concern on the part of the plaintiffs as to the possibility that they might have had to return to the defendants and KEC the money paid upon the sale. Certainly if execution of the consent letter by the non-selling stockholders of KEC was, as plaintiffs alledge, a condition precedent to the sales plaintiffs would have evidenced some concern that said condition was not met and as prudent men provided for such an alternative by segregating the funds.[4]

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[4] Defendants note that the plaintiffs did not contend that the Consent Letters were an integral part of the sales transactions or

(footnote continued on following page)

As the Court below properly found, the sales of plaintiffs' securities to the defendants were consummated on the dates that the plaintiffs delivered the securities to the defendants and accepted full payment therefor. A careful reading of the consent letters demonstrates that these documents were not part of the transactions between plaintiffs and defendants, but rather said consent letters were a proposed agreement between the defendant buyers and the non-selling shareholders of KEC, sent to said non-selling shareholders in order to cure plaintiffs' breach of the Shareholders' Agreement. Plaintiffs have presented neither facts nor law to demonstrate that the Trial Court's view of the documents was clearly erroneous. Therefore the judgment of the Court below should be affirmed.

POINT II

The defendants took good and valid title from plaintiffs on the dates on which the stock was delivered and the purchase price paid.

On December 30, 1968, plaintiffs Barnett and Gordon sold all of their shares in KEC to the defendants Kirshner, Moelis and Cohen. On January 29, 1969, plaintiff Hollender sold his holdings to the defendant Cohen, as nominee for Irving Moskovitz.[5] At the time of the sale the plaintiffs delivered to the defendants documents evi-

(footnote continued from preceding page)

that they constituted conditions precedent until July of 1974 when they sought leave to amend their complaint (see ¶ II, Joint Pre-Trial Order). This was four years after the action was commenced and six years after the consent letters were prepared and sent out and the sales of plaintiffs' stock consummated.

[5] Irving Moskovitz was the attorney for one Harry Saltzman. Although it has been contended by plaintiffs that Harry Saltzman was the true buyer of the shares, as late as February 17, 1970, the date of the prospectus issued by KEC, Irving Moskovitz remained the record owner of Hollender's shares (Ex 90, p. 13).

dencing a transfer of ownership of the securities and accepted from the defendants the purchase price agreed upon. The delivery of the securities by the plaintiffs and the acceptance of payment therefor passed good and valid title from the plaintiff sellers to the defendant buyers. *Matter of Argus Co.* v. *Manning, et al.,* 138 N.Y. 557 (1893); *Harper* v. *Raymond,* 3 Bos. 29 (N.Y. 1858); *Mischer* v. *Burke,* 456 S.W. 2d 550 (Tex. Civ. App. 1970); *State ex rel. Scott* v. *Caddo Rock Drill Bit Co.,* 141 La. 353, 75 So. 78 (1917); *Star Mutual Telephone Co.* v. *Longfellow,* 85 Kan. 353, 116 Pac. 506 (1911).

The existence of a restrictive covenant in the KEC stockholders' agreement may have placed a "cloud" on the title which the defendant buyers acquired from the plaintiff sellers, for any non-selling shareholder of KEC had a right to attack the defendants' title by reason of the plaintiffs' failure to comply with the restriction in the KEC shareholders' agreement. However, only the non-selling shareholders had a right to attack defendants' title; this right was not shared by the plaintiffs, particularly since the plaintiffs were not the parties for whose benefit the restriction was intended. *Matter of Argus Company, supra; Lieberman* v. *Lincoln Rochester Trust Co.,* 56 Misc. 2d 81, 288 N.Y.S. 2d 186 (1968), aff'd. 30 App. Div. 2d 1049, 295 N.Y.S. 2d 623 (4th Dept. 1968); *Bloomingdale* v. *Bloomingdale,* 107 Misc. 646, 177 N.Y. Supp. 873 (N.Y. 1919).

Plaintiffs' argument that the "consent letters" created a condition precedent to the completion of the transaction of sale between plaintiff seller and defendant buyer is clearly erroneous. All of the cases which plaintiff presented to the Court below in connection with their motion for judgment notwithstanding the verdict, which are repeated in plaintiffs' brief on appeal, are inapposite; for, as Judge Knapp noted on page 8 of his opinion (JA 25a), the cases cited by the plaintiffs deal either with sales conditioned on the performance of certain acts, or are illustrations of the generally accepted legal principle

that the purchaser of stock subject to an option of first refusal may be subject to an action for rescission brought by the corporation or its shareholders. The Trial Court properly found that neither of those conditions existed in the case at bar.

The legal issues presented in the instant case are closely akin to those considered by the Texas Court of Civil Appeals in the matter of *Mischer* v. *Burke, supra.* The pronouncement by the Texas Court in the *Mischer* case to the effect that "[A]n attempted transfer in violation of a first option restriction operates as a transfer of title as between the seller and purchaser even though it did not complete the purchaser's right to the benefits of a stockholder so far as the company was concerned" *Mischer* v. *Burke, supra,* at 555, is in direct accord with and is supportive of the rationale applied by the lower Court in the instant case. Judge Knapp properly concluded that title passed as between buyer and seller upon the delivery and payment for the securities, and that the consent letters were not an attempt by the parties to create a condition precedent but rather an attempt by buying defendants to accede to the "benefits of a stockholder so far as the company was concerned" by curing the plaintiffs' breach of the restriction contained in the Shareholders' Agreement.

The plaintiffs in selling their stock to the defendants had done so in violation of the KEC Shareholders' Agreement. The defendants, by the letter of consents, attempted to cure that breach and remove any "cloud" on their title to the stock. The plaintiffs cannot be permitted to successfully claim that their breach vested an option in them to rescind their sale to the defendants at any time up until the date upon which the last non-selling stockholder returned the consent letters. As between plaintiff-seller and defendant-buyer title passed on the day that the securities were delivered and the payment for same was accepted. Plaintiffs' claim to the contrary is without merit.

POINT III

The identity of the ultimate purchaser of plaintiff Hollender's stock is not a material fact.

In order for the plaintiffs to sustain their contention that the defendants' failure to advise Hollender that Mr. Saltzman was indirectly involved in the purchase of his securities constitutes a violation of 10b-5, they must show that said failure was a failure to disclose a "material fact". *List* v. *Fashion Park Inc.*, 340 F.2d 457 (2nd Cir. 1965), cert. den'd 382 U.S. 811 (1966). The plaintiffs cannot sustain this burden.

As admitted by the plaintiffs in their Brief, there was a falling out between Hollender and Saltzman over the firing of a fellow named Haft (Plaintiff's Brief, page 28). Hollender subsequently attempted to discuss the matter with the defendants Kirshner and Moelis, in order to induce them to intercede with Saltzman. The defendants' refusal to become involved in the matter resulted in Hollender requesting that he be bought out of the Company (Tr 76-78). Hollender's letter of January 10th requesting that KEC buy his shares clearly establishes the fact that Hollender wished to sell and really didn't care to whom (Ex 53 @ JA 130a).

Defendant Moelis, in keeping with his express policy of being willing to buy out any stockholder who was dissatisfied, made arrangements to have Hollender's shares purchased. Since KEC was a closely held corporation, obviously Moelis would want the shares purchased by someone with whom Kirshner and Moelis had a relationship. Thus, Mr. Saltzman enters the picture.

There was obviously nothing devious or sinister in the defendants arranging to have Hollender's shares acquired

indirectly by Saltzman, if such was in fact the case.[6] The defendants' desire not to tell Hollender that Saltzman was involved in the purchase of his shares, because of the bad blood that had arisen between Saltzman and Hollender over the Haft matter, certainly does not rise to the level of failing to disclose a "material fact". This Circuit has held that a "material fact" is one to which a "reasonable man" would attach importance in determining his choice whether to make the sale or not. See *List* v. *Fashion Park Inc.*, *supra* at 461-463.

The fact that Hollender might not have sold to Saltzman because of their recent fight over Haft, would be neither reasonable nor directed toward the question of whether he should sell or hold his shares in KEC.

Hollender wanted out of KEC. Moelis wanted to buy out any dissatisfied stockholder. Moelis and Kirshner had recently expended substantial sums of money in connection with the acquisition of Barnett's and Gordon's shares, so someone else was brought in to buy out Hollender. Under such circumstances plaintiffs' claim of a violation of 10b-5 is totally without merit. See, *Ross* v. *Licht*, 263 F. Supp. 395 (S.D.N.Y. 1967).

The cases cited by plaintiffs in their brief do not support plaintiffs' position for in each case it is clear that concealment of the identity of the purchaser was one fact in an established pattern of fraudulently concealed information. There is not even a suggestion of fraudulent concealment in the instant case.

The plaintiffs' contention that had Hollender known that Saltzman was the purchaser of his shares, he would have "smelled a rat" (JA 62a) can only be characterized as "minor league Monday morning quarterbacking". The Trial Court, after hearing all of the evidence and judging the candor and demeanor of all of the witnesses, expressly found that Irving Cohen was a truthful and credible wit-

[6] See footnote 5 *supra*, pg. 14.

ness. The Court therefore accepted Mr. Cohen's testimony and found that "the first time the possibility of a Lerner-KEC transaction crossed his (Cohen's) mind was on February 2, 1969, when defendant Moelis suggested over the telephone that Cohen arrange a meeting between Kirshner and Lerner" (Court's Opinion, JA 26a). The aforesaid was also stipulated in the Pre-Trial Order (JA 36a). Thus, on January 29th, the date Hollender sold his stock to Cohen, acting as nominee for Saltzman's attorney, Irving Moskovitz, there was no "rat" to smell.

The purchase of Hollender's stock was brought about through Hollender's direct solicitation of the defendants. The only significance of Saltzman's involvement in that transaction was Hollender's personal dislike for Saltzman, which dislike cannot be used by the plaintiffs to elevate Saltzman's indirect participation in the transaction to a "material fact" which had to be disclosed.

The desire of the defendants to satisfy Hollender's demand to be bought out of KEC without their getting embroiled in the personal bitterness which had arisen between Hollender and Saltzman cannot give rise to a 10b-5 violation. From all of the facts and circumstances in this case it cannot be said that the defendants had failed to advise Hollender of any material fact.

Conclusion

On December 30, 1968 and January 29, 1969, the plaintiffs sold and delivered their stock certificates to the defendants, who thereupon paid to plaintiffs the full purchase price.

On the dates of said sales defendants took good and valid title from the plaintiffs. As the Trial Court properly held, the so-called consent letters were not part of the sales transaction but rather said letters were prepared

in an effort to protect the defendants from any possible claims by non-selling shareholders of KEC which might arise out of plaintiffs' breach of the Shareholders' Agreement. Further, the fact that one Harry Saltzman may have acquired an indirect interest in the shares sold by plaintiff Hollender, was not a material and necessary fact required to be disclosed to plaintiffs. Hollender's personal dislike for Saltzman is irrelevant to the sale of Hollender's stock.

The order and judgment appealed from should, in all respects be affirmed.

Respectfully submitted,

HARRIS, FREDERICKS & KOROBKIN
Attorneys for Defendant-Appellees
1271 Avenue of the Americas
New York, New York 10020

BARRY I. FREDERICKS
EDWARD MARION
Of Counsel

376—Affidavit of Service by Mail

United States Court of Appeals for the Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

LAWRENCE R. BARNETT ET AL.

Plaintiffs-Appellants

against

DON KIRSCHNER ET AL.

Defendants-Appellees

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York, ss.:

Raymond J. Braddick, agent for Harris, Fredericks & Korobkin Esqs., being duly sworn deposes and says that he is the attorney for the above named Defendants-Appellees herein. That he is over 21 years of age, is not a party to the action and resides at Levittown, New York

That on the 8th. day of August, 19 75 he served the within

Brief

upon the attorneys for the parties and at the addresses as specified below

Bergreen & Bergreen Esqs. 660 Madison Avenue New York, New York

by depositing 3 true copies

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 8th. day of August, 1975

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4507705
Qualified in Delaware County
Commission Expires March 30, 1977

Raymond J. Braddick